COMPARATIVE LABOR LAW DOSSIER
LABOUR EFFECTS OF CORPORATE GROUPS IN *[BELGIUM]*

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Introduction

The Belgian legal order tends to hold every individual company accountable as a separate legal entity and maintains that a corporate group has no legal personality as such. Notwithstanding power relations present between companies in a group, regulations are often not amended to take these changed circumstances into account. Specific labor law provisions concerned with corporate groups are scarce and mainly try to preserve social dialogue in more complex corporate structures. This lack of regulation prompts judges to extend existing doctrines. Most notably, the doctrine of co-employment is used to hold companies jointly liable in certain instances.

1. Is there a definition of corporate group or group of companies in your labor legal system?

Belgian labor law does not contain a general definition of corporate groups.[1] Only certain specific regulatory instruments refer to the concept of which two stand out. These illustrate that no uniformity exists.

The first reference concerns the possibility for some individual companies to ease their duty to employ a certain quota of young workers because of the total amount of young workers employed in the group.[2] To that end the King, after the necessary debate in the Council of Ministers, can determine the meaning of a 'groupe d'employeurs'. The King therefore specified that a 'groupe d'employeurs' presupposes multiple legal entities that fulfill the socio-economic conditions of 'article 14, §2 b) de la loi du 20 septembre 1948 portant organisation de l'économie' and thus form a technical corporate unit, i.e. 'unité technique d'exploitation'.[3] Accordingly, a corporate group for this specific purpose, includes multiple legal entities that meet two conditions. The first condition is met either if the legal entities form one economic group, are managed by one person or managed by several persons with an economic relationship; or if the legal entities are engaged in the same activity or align their activities to one another. The second condition is fulfilled if proof exists of social cohesion between the legal entities.

[1] J. PEETERS, "De notie 'groep' in het Belgisch (collectief) arbeidsrecht" in M. VANMEENEN and A. VAN HOE (eds.), *De vennootschapsgroep in de greep van het recht*, Antwerpen, Intersentia, 2013, 127.
[2] Art. 41 loi 24 decembre 1999 en vue de la promotion de l'emploi, *BS* 27 janvier 2000, http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&cn=1999122443&table_name=loi.
[3] Art. 8bis arrêté royal 30 mars 2000, d'exécution des articles 26, 27, alinéa 1er, 2°; 30, 39, § 1er, et § 4, alinéa 2, 40bis, alinéa 2, 41, 43, alinéa 2, et 47, § 1er, alinéa 5, de la loi du 24 décembre 1999 en vue de la promotion de l'emploi, *BS* 31 mars 2000, http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&cn=2000033032&table_name=loi.

A second reference is made in the statute regarding employment participation in the company's capital and profits.[4] For the purpose of this law, the conditions of article 11 of the Company Code apply. As such in order to form a corporate group, several companies have to be interconnected due to the control exercised over one another or the fact that they belong to a 'consortium', i.e. companies that obey the same central management without being subsidiaries of one another or of the same parent company.

2. In your legal system, are there joint labor and Social Security liabilities between the companies of a valid corporate group?

If a company belongs to a concern of legal entities, there will in principle only exist an employee relationship between the worker and the legal entity that concluded the contract of employment.[5] Labor law does not provide any basis to hold a different legal entity in the same group liable for the contractual obligations of the company-employer. The distinct corporate personality of every legal entity in the group is respected. Accordingly, in principle each separate legal entity is responsible for compliance with labor law and its own social security obligations.

If the wages are paid by a third party, however, this third party will be deemed employer with regard to the collection and recovery of social security contributions as well as the obligations relating to the wage.[6]

3. Are there cases in which there is joint liability of the companies of a group with respect to labor and Social Security obligations of other companies of the group? That is to say, what labor consequences derive from the incorrect constitution of a corporate group or group of companies?

General rules of liability law are to be applied. Notwithstanding the prominence attributed to strict separation between different legal personalities, liability law might hold other legal entities within the group accountable in case of abuse of legal entity or excessive risks taken by one single legal entity.[7] These liability techniques are also available to employees provided that the technique's conditions are fulfilled. As such the parent company might be held accountable for example if the directors of the subsidiary are also identified as employees of the parent company, or if the parent company as a third party contributed to the breach of employment contract.[8]

4. What are the labor effects of the fact that a worker provides services for more than one company of the group? What are the labor effects of contractual or commercial relationships between companies of the group, such as loans, financing

[4] Art. 8 loi 22 mai 2001 relative aux régimes de participation des travailleurs au capital et aux bénéfices des sociétés, *BS* 6 juin 2001, http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&cn=2001052233&table_name=loi.

[5] M. VAN PUTTEN, *Het arbeidsrecht en de onderneming*, Antwerpen, Intersentia, 2009, 694.

[6] Cour Trav. Anvers 10 decembre 1999, http://jure.juridat.just.fgov.be/pdfapp/download_blob?idpdf=N-19991210-5.

[7] M. VAN PUTTEN, *Het arbeidsrecht en de onderneming*, Antwerpen, Intersentia, 2009, 701.

[8] B. VAN BRUYSTEGEM, "De vennootschap van de multinationale onderneming", *RW* 1979-80, 2288.

agreements or cash pooling? And transfer pricing policies? And the development of management functions by a company of the group with respect to another company?

The Employment Appeal Tribunal of Brussels clearly stated in 1998 that no single statutory provision obstructs an employee to provide the same labor for two separate employers under one contract of employment.[9] A decade earlier the same Tribunal had already ruled that both the subsidiary and parent company are an employer, if both exercise employers' prerogatives vis-à-vis the same white-collar worker. Since the employee provided the same service for both companies, the companies were jointly and severally liable to the employee.[10] The fact that two companies are associated or share a same managing director however does not suffice to establish joint and several liability.[11] Although rather the exception, different companies can thus be bound by the same contract of employment if they are closely connected and both exercise employer's prerogatives regarding the same employee.[12] Jurisprudence then holds these employers either jointly and severally liable or liable *in solidum*[13] for compliance with the employer's obligations.

No fixed rules exist to determine whether the required connection is present between the different companies. Duality of employers has been established a.o. in the following cases:

- A parent company and subsidiary with shared directors and mixed management, were both engaged in drawing up, implementing and terminating the contract of employment and both companies exercised authority over the employee.[14]
- A Belgian parent company was the sole shareholder in a small foreign subsidiary, both companies pursued the same activities, had the same management, and the parent company even directed the resignation and several commands to the employee.[15]
- No factual distinction existed between two companies and both constituted a single economic management unit.[16]
- Both companies had authority over the employee and their doings led to continuous confusion over their management and activities.[17]
- Two successive subsidiaries have also been deemed jointly and severally liable to the employee because of the enormous confusion and lack of clarity about which one was the actual employer.[18]

Commercial contracts between corporations within the group, do not seem to result in labor effects. After the agreed upon termination of an employment contract with one company in the group complemented by the conclusion of an employment contract with another, the court decided that the second company's capacity as the new employer was

[9] Cour Trav. Bruxelles 7 octobre 1998, *JTT* 1999, 152-153.
[10] Cour Trav. Bruxelles 11 septembre 1984, *JTT* 1986, 262.
[11] Cour. Trav. Bruxelles 24 octobre 1984, *TSR* 1985, 216.
[12] W. VAN EECKHOUTTE, *Sociaal Compendium*, I, Mechelen, Kluwer, 2016-17, 627.
[13] The primary consequences of *in solidum* liability are the same as those of joint and several liability, but the secondary are not.
[14] Cour Trav. Liège 10 novembre 2005, *Soc.Kron.* 2006, 321.
[15] Cour Trav. Liège 6 juin 2006, *JTT* 2006, 373.
[16] Trib. Corr. Gand 17 mars 2008, *Soc.Kron.* 2010, 528.
[17] Cour Trav. Liège 13 septembre 2013, *JLMB* 2014, 651.
[18] Cour. Trav. Liège 8 juin 1998, *JLMB* 2000, 1415.

not influenced by the fact that its employee was still enrolled in the pension scheme and on the payroll of another company in the group.[19] As the previous examples have shown, Belgian case law tends to put a lot of enfaces on the shared or joint exercise of employer's authority in order to attribute joint liability.[20] Another determining element is the confusion about parties' mutual relations and their responsibilities towards different business units.[21]

With regard to the hiring out of workers, it is important to note an exception to the general rule. Belgian law in principle prohibits[22] an employer to hire out employees to a third party, if that third party makes use of the employees and exercises any kind of authority over them that would normally be exercised by the employer. One of the few exceptions[23] to this prohibition stipulates that an employer can hire out permanent employees for a limited period of time, if this occurs secondary to the ordinary activities, and only in case of approval from the head of the district of the Social Legislation Inspectorate. This approval is not needed, however, if a permanent employee maintains his original contract of employment with the employer, and is hired out exceptionally:

a) "*dans le cadre de la collaboration entre entreprises d'une même entité économique et financière;*
b) *en vue de l'exécutation momentanée de tâches spécialisées requérant une qualification profesionelle particulière;*"

This exception lends itself to corporate groups and replaces the need of approval with an obligation to give notice 24 hours in advance.

5. How are working conditions of the workers hired by companies of a group of companies determined? In particular, is there a principle of equal treatment between workers of the different companies of the group?

Belgian legislation does not provide for a principle of equal treatment with the purpose of delivering equal treatment for workers of different companies in a group. In principle the fact that companies belong to the same corporate group is of no importance and companies can negotiate working conditions independently from one another. The hierarchy of norms, however, results in the priority of most collective bargaining agreements over individual employment contracts. Therefore, not only does 'la loi relative aux contrats de tavail' impose the voidness of any clause causing the restriction of employees' rights provided in that statute, as well as the voidness of any clause aggravating the duties of employees as described in that statute. The national collective bargaining agreements will also limit the possible differences between companies' working conditions, since they take precedence. If both companies exercise the same core

[19] Cour Trav. Bruxelles 19 mars 1997, *Soc.Kron.* 1998, 503.
[20] Cour. Trav. Bruxelles 28 juin 2013, *RABG* 2014, 884, http://jure.juridat.just.fgov.be/pdfapp/download_blob?idpdf=N-20130628-7.
[21] M. VAN PUTTEN, *Het arbeidsrecht en de onderneming*, Antwerpen, Intersentia, 2009, 694.
[22] Art. 31 §1 loi 24 juillet 1987 sur le travail temporaire, le travail intérimiaire et la mise de travailleurs à la disposition d'utilisateurs, *BS* 20 août 1987, http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&cn=1987072431&table_name=loi.
[23] Art. 32 §1 loi 24 juillet 1987 sur le travail temporaire, le travail intérimiaire et la mise de travailleurs à la disposition d'utilisateurs, *BS* 20 août 1987.

business, the bargaining agreements concluded at the sectoral level might furthermore impose minimum provisions.

6. Is it possible to adopt a collective bargaining agreement applicable to all companies of the group? Can collective bargaining agreements at company level also exist? In this case, what agreement will be applicable, the industry-level, the group-level or the company-level collective agreement?

Collective bargaining agreements can be concluded on different levels. First and foremost collective bargaining agreements are entered into on the national level and apply to the entire private sector. In numerical terms, most collective bargaining agreements are concluded on the sectoral level and often regulate the most essential working conditions. These have a national scope but only apply to companies with the same sector specific core business. Additionally, collective agreements can also be entered into on the regional or company level.
Pursuant to article 51 of 'la loi sur les conventions collectives de travail et les commissions paritaires', the collective bargaining agreements concluded in the 'Conseil National du Travail' come first. Sectoral level agreements negotiated in the Joint Committees come second and precede the ones entered into in subcommittees. Agreements reached outside these bodies, i.e. regional or company level, come last. Consequently, a lower standard can only deviate from a higher standard if it benefits the employee by supplementing a minimum norm or reducing a maximum norm.
An agreement reached between a representative trade union and several employers is certainly possible, but does constitute an agreement reached outside of the aforementioned bodies. The fact that employers belong to a corporate group does not change this outcome. Therefore the different companies constituting a corporate group could certainly enter into the same collective bargaining agreement but the agreement would have to be in accordance with the higher norms.

7. What are the consequences of the integration of a company into a corporate group or group of companies in the context of redundancies? In particular, to prove the grounds for the redundancy, does the regulation take into account the situation of the group or only the situation of the company in question?

The commentary added to article 6 of 'convention collective de travail n° 24 concernant la procedure d'information et de consultation des representants des travailleurs en matiere de licenciements collectifs […]' explicitly refers to instances of collective dismissals factually issued by a company retaining control over the actual employer. In such instances, the employer is not entitled to any ground of defence because of the lack of information provided by the company that insists on the dismissals. The obligations imposed under the directive relating to collective redundancies, concerning counselling, consultation and notification as well as those under the collective bargaining agreement retain their full effect and non-compliance is sanctioned accordingly.
To ascertain whether the collective dismissal protection is warranted, Belgian provisions implementing article 1 of Directive 98/59, widen the personal scope of application. In contrast to the Directive, stating that the protection is due if conditions are met with regard to workers in one 'establishment' who have been or who will be made redundant, Belgian collective bargaining agreement n° 24 makes the protection due if conditions are met in

the 'undertaking' defined as a technical corporate unit. In order for Belgian law to be interpreted in conformity with the Directive, this entails that the protection is due in both cases of the conditions being met either on the level of the 'establishment' or the level of the 'undertaking'. [24]
This Belgian concept of 'undertaking' defined as a technical corporate unit for the purposes of collective redundancies, however, makes it possible for multiple legal entities to constitute an 'undertaking'.[25] There is even a rebuttable presumption[26] with regard to the duty to set up a works council, holding that multiple legal entities constitute a technical corporate unit if its proven:

"(1) que, soit ces entités juridiques font *partie d'un même groupe économique* ou sont administrées par une même personne ou par des personnes ayant un lien économique entre elles, soit ces entités juridiques ont une même activité ou que leurs activités sont liées entre elles; (2) et qu'il existe certains éléments indiquant une cohésion sociale entre ces entités juridiques, […]" (emphasis added)

Although this presumption is not applicable with regard to collective redundancies, it does show the type of social and economic criteria used to define a technical corporate unit. In some instances the group might therefore be deemed an 'undertaking', whereas the subsidiaries might be deemed an 'establishment', thus expanding the situations that warrant the protection provided by collective bargaining agreement n° 24.

If the amount of dismissals within a given timeframe do not meet the specific conditions to trigger collective dismissal protection, the situation of the company belonging to a group will not be taken into account in case of individual dismissals. Traditionally Belgian labor law stresses the power of the employer to make employees redundant. The protection against unjustified dismissal, i.e. 'licenciement manifestement déraisonnable', for example will hardly be applicable because it is only due if :

- the dismissal is not based on the suitability or conduct of the employee, or "*les nécessités du fonctionnement de l'entreprise, de l'établissement ou du service*"[27];
  and
- no regular, reasonable employer would pursuit the dismissal in question.

8. Who are the negotiating partners within the framework of a redundancy? Are they employers' and workers' representatives from the particular company or from the parent company?

Belgian law should abide by the ECJ's ruling *Fujitsu Siemens* concerning articles 2(1) and 2(4) of Directive 98/59, meaning that in case of a group of undertakings, the

[24] C. ENGELS, "Collectief ontslag en sluiting van onderneming" in F. HENDRICKX and C. ENGELS (eds.), *Arbeidsrecht*, III, Brugge, Die Keure, 2016, 335-338.
[25] C. ENGELS, "Collectief ontslag en sluiting van onderneming" in F. HENDRICKX and C. ENGELS (eds.), *Arbeidsrecht*, III, Brugge, Die Keure, 2016, 337.
[26] Art. 14 §2 b) loi 20 septembre 1948 portant organisation de l'économie, *BS* 27 septembre 1948, http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&cn=1948092001&table_name=loi.
[27] Art. 8 convention collective de travail n° 109 concernant la motivation du licenciement, http://www.cnt-nar.be/CCT-ORIG/cct-109-(12-02-2014).pdf.

subsidiary which has the status of employer is obligated to hold consultations with the workers' representatives, once that subsidiary within which collective redundancies may be made, has been identified.[28] The exchange of information and consultation takes place between the employer and works council, or alternatively union delegation, or if no such delegation exists the workers or their representatives. Belgian law does not provide for an obligation to form a works council on the level of the group. Instead in case of a group of undertakings, as laid down in article 2 of 'convention collective de travail n° 9 coordonnant les accords nationaux et les conventions collectives de travail relatifs aux conseils d'entreprise […]' and article 1 of 'l'arrêté royal portant régelementation des informations économiques et financières à fournir aux conseils d'entreprises', the company's works council is entitled to information concerning the policies of the group that impact the company's economic and financial situation.[29]
Under article 11 of collective bargaining agreement n° 9, the works council must be informed in due time and in advance of any other disclosure. C. ENGELS points out the difficulties that arise with regard to the European works council's information exchange and consultation rights.[30] To that end the agreement that establishes the operation of the European works council will be decisive, regardless of the national legislation that determines how to inform and consult employees, and can thus determine the procedure applied to inform and consult both councils. If decisions likely lead to substantial changes in work organization or contractual relations, like for instance redundancies, and the agreement doesn't fix the procedure, the exchange of information and consultation in the European works council and national representation body should proceed simultaneously.[31]

9. In the event of a redundancy, is there an obligation to relocate to another company of the group the employees affected by such redundancy?

Belgian law does not contain any legal provision to that effect. Such an obligation might exist, however, if it is included in an applicable collective bargaining agreement.
In addition, companies that pursue collective redundancies have to establish a job unit, i.e. 'cellule pour l'emploi' to try and get the employees, that have been made redundant, back to work.[32] The possibility to reemploy the affected employees in other companies of the group will almost certainly be one of the points discussed.

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[28] ECJ 10 September 2009, Akavan Erityisalojen Keskusliitto AEK ry and Others v Fujitsu Siemens Computers Oy, C-44/08.
[29] J. PEETERS, "De notie 'groep' in het Belgisch (collectief) arbeidsrecht" in M. VANMEENEN and A. VAN HOE (eds.), *De vennootschapsgroep in de greep van het recht*, Antwerpen, Intersentia, 2013, 138.
[30] C. ENGELS, "Collectief ontslag en sluiting van onderneming" in F. HENDRICKX and C. ENGELS (eds.), *Arbeidsrecht,* III, Brugge, Die Keure, 2016, 355-356.
[31] Article 45 convention collective de travail n° 101 concernant l'information et la consulation des travailleurs dans les entreprises de dimension communautaire et les groups d'entreprises de dimension communautaire, http://www.cnt-nar.be/CCT-COORD/cct-101.pdf.
[32] Loi 23 decembre 2005 relative au pacte de solidarité entre les générations, *BS* 30 decembre 2005, http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&cn=2005122330&table_name=loi and arrêté royal 9 mars 2006 relatif à la gestion active des restructurations, *BS* 31 mars 2006, http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&cn=2006030940&table_name=loi.

10. What is the effect of calling a strike in a group company? Could the other companies of the group contract with a third company to replace the services provided by the company on strike?

The Belgian legislature has refrained from regulating the right to strike. Historically the Cour de Cassation's judgement 'De Bruyne'[33] is seen as the first strong legal foundation of the right to strike in domestic law. The legislative foundation, however, has later been based on article 6 §4 of the European Social Charter, notwithstanding the uncertainty about the direct effect of the provision. The lack of domestic legal provisions concerning the right to strike, except for the prohibition[34] of workers on strike being replaced with temporary agency workers, does mean that a third party is allowed to replace the services provided by the company on strike.

References and judicial decisions

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VAN PUTTEN, M., *Het arbeidsrecht en de onderneming*, Antwerpen, Intersentia, 2009, 885 p.

[33] Cass. 21 decembre 1981, *Arr.Cass.* 1981, 541.
[34] Art. 19 convention collective de travail n° 108 relative au travail temporaire et au travail intérimaire, http://www.cnt-nar.be/CCT-COORD/cct-108.pdf.